"Judges should be fully insulated from any sort of pressure"

Koen Lenaerts 2020-01-30T09:00:00

***Anna Wójcik**: Why is the principle of mutual trust between Member States fundamental for the European Union? How does a State earn trust?*

Koen Lenaerts: The Member States are all committed to the values referred to in Article 2 of the Treaty on European Union. These include respect for human dignity, freedom, democracy, the rule of law and human rights in a society characterised by pluralism, tolerance and justice. These values are further explained in many other provisions of the Treaties and in the Charter of Fundamental Rights of the EU.

All Member States are required to adhere to those common values in their domestic legal orders, which is why they can trust each other. In order to trust someone, you need to be more or less able to predict how that person will behave. This does not mean that the other person must do exactly the same thing as you. Within a relationship of trust there is room for freedom to make one's own choices. This is also true among Member States. Each one makes its own policy choices. But these choices must reach a common minimum threshold, in terms of values and of rules, that applies to all Member States.

The argument that 'the EU is interfering with national competences' misses the point. States can only trust each other within the EU if they are confident that they are all equally committed to the values of pluralism, tolerance and democracy, that democracy being built, moreover, on fundamental freedoms and the principle of solidarity. Provided that they respect this common foundation, Member States can make their own choices in matters falling under national competences. Mutual trust therefore means that Member States may make different choices, but also that they must be able to trust each other because they share common values.

For instance, behaviour that constitutes a criminal offence in Belgium may not be punishable under criminal law in the Netherlands, Poland, or Portugal. But the criminal proceedings in all Member States of the EU must be conducted before fully independent, impartial courts, according to fair trial rules, with the rights of the defence being respected and appropriate rules on the administration of evidence observed. There is thus a basket of rules that need to be respected in order for a judge in one Member State to put trust in proceedings before a court in another Member State, which are governed by rules reflecting different legislative choices made in that Member State. It is very important to distinguish this basic level of commonality of values and meta-constitutional principles from the choices that each State makes within this common framework.

AW: *Imagine there is a hypothetical country where disciplinary proceedings are launched against judges who refer questions for a preliminary reference to the Court of Justice of the EU. Can such a country be trusted in the EU legal space?*

KL: Due to various cases currently pending before the Court of Justice, I cannot answer your question.

AW: *Are you aware that there are more than one thousand one hundred disciplinary proceedings pending against judges in Poland at the moment?*

KL: I am of course aware that there are disciplinary proceedings against judges in Poland, because a lot of that information has been made public and, crucially, there are also cases pending before the CJEU where parties provide factual information in that regard that is, moreover, sometimes contradictory. But again, I cannot say anything more while those cases are pending.

AW: *Why is judicial independence crucial for the EU legal space?*

KL: I can answer that question in detail and fully, because there is relevant case law on this matter. These are, by the way, old cases, not involving Poland.

There was the very famous *Wilson* case (C-506/04) involving the Grand-Duchy of Luxembourg. Mr. Wilson was a British barrister who wanted to register as a lawyer in Luxembourg. Although he intended to work only in English and French, his request was dismissed because he did not know Luxembourgish and German. The Bar Council informed Mr. Wilson that he could appeal that decision before a Disciplinary and Administrative Committee which consisted, at first instance exclusively, and on appeal principally, of lawyers registered at the Luxembourg Bar. Instead, Mr. Wilson appealed to the Luxembourgish Administrative Courts, which asked the CJEU whether such a body, essentially consisting of stakeholders – members of the professional group whose decision was being challenged – was an independent court within the meaning of EU law. Unsurprisingly, the answer was ‘no’. The CJEU provided here for the first time a detailed explanation of what judicial independence involves.

That judgment was given in 2006. The CJEU ruled that effective judicial protection is a general principle of Community – now Union – law stemming from the constitutional traditions common to the Member States and enshrined in the European Convention on Human Rights. It requires national courts to be independent and impartial.

Independence is, in the first place, freedom from all forms of external pressure. Not only from the pressure of the ruling party and the legislative and executive powers, but also from financial groups, technology industry giants, trade unions and any other pressure groups. Judges should be fully insulated from any sort of pressure.

There is also an internal dimension to independence, meaning that judges must be and must remain at an equal distance from all the parties to the dispute. A judge must not have even the slightest personal interest in one party winning the case or

losing it. The only interest that a judge may have in the outcome of the case must be his or her professional interest in the correct application of the law. And the correct application of the law can only be verified within the framework of the judicial process itself, that is by bringing an appeal or a final *cassation* appeal or a final appeal before the constitutional court, as it is possible in certain Member States. To coin a well-known phrase: by exhausting the remedies within the judicial system. That equal distance is also a matter of perception: none of the parties should entertain any reasonable doubt as to the judge's impartiality.

AW: *There is a tendency in Poland and possibly also in some other Member States to see the CJEU as pronouncing on judicial independence issues in relation to current political disputes.*

KL: As I explained, judicial independence is an important *legal* issue. There is case law of both the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union on that issue, which is over 50 years old and was developed in cases relating to the six original Member States.

AW: *In public debates, there are many misconceptions about what a judge should do in the case of a conflict between national law and EU law. Could you briefly explain this?*

KL: When national law is in conflict with EU law, there is no possible misconception as to the principle that EU law prevails. Why? A populist way of presenting this is often that Europe is somehow 'crushing' the Member States. Nothing could be further from the truth. The Member States *are* the European Union.

What is the unity, the uniformity of Union law? It is very simple. It is the ultimate guarantee of equality. That principle is breached when, for example, taxpayers in one Member State do not effectively benefit from the rights that they derive from Union law concerning, say, free movement of capital or the freedom of establishment. Or when, for instance, consumers are not protected against unfair contractual terms. Or, and I refer here to the *Wilson* case that I mentioned previously, when a British barrister does not enjoy an effective judicial remedy before an independent court in Luxembourg, whereas his colleague, who would like to register at the Paris Bar or the Frankfurt Bar, does benefit from such protection. In all those examples, the problem is ultimately a breach of equality between citizens of the Union. And EU law cannot accept this.

National courts are at the forefront in terms of applying EU law. The CJEU is, in a sense, a helpdesk for interpreting that law. A national court that refers a question is responsible for applying EU law on the basis of the interpretation that the CJEU provides because national courts are subject to the principle of supremacy of EU law. Accordingly, they must apply that law and must decide, where necessary, that a provision of national law is to be set aside in a particular case.

Indeed, all Member States have agreed to transfer competences to the European Union and provided that the EU has correctly exercised those competences in adopting appropriate legislation, the law of the EU is the 'law of the land' in all EU

Member States. The latter must therefore respect it. Member States are bound by their commitment to confer certain competences to the EU. Provided that the EU exercises those competences in compliance with the EU Treaties and the Charter of Fundamental Rights of the EU, the EU act at issue prevails over national law.

Judges in all Member States refer questions to the CJEU on the correct interpretation of Union law, precisely in order to be able to set aside any conflicting provisions of national law. That is the essence of the direct effect and the supremacy of EU law – principles established in 1963 in *van Gend and Loos*, a Dutch case, and in 1964 in *Costa v ENEL*, an Italian case. Those principles apply equally to all EU Member States.

AW: *Again, in the public debate, there has been some disagreement concerning the limits of the activity of judges. Can judges participate in demonstrations or express their concerns in matters of public interest?*

KL: Judges should not express themselves, through whatever medium, in a manner which adversely affects the public perception of their impartiality. This does, however, not prevent them from explaining the basic requirements of the rule of law.

There is in this respect an important judgment of the European Court of Human Rights from 2016 in *Baka v Hungary*. In this judgment, one can read that judges enjoy freedom of expression related to the basic values of the EU legal order, such as democracy, the rule of law, fundamental rights, etc. Having said that, the traditions of Member States differ significantly within the EU, and the same is true across the world, if one looks at it globally.

I am Belgian, so if I take the Belgian example, judges in Belgium cannot participate in political activities. That being said, according to the *Baka* judgment of the ECtHR, they cannot be prevented from speaking out on the values I mentioned before. For instance, it is acceptable for a Belgian judge to give a public lecture explaining what, in his or her view, the requirements of the rule of law entail for the independence and impartiality of courts, a fair trial, rights of the defence, the adversarial nature of proceedings, fairness and presentation of evidence. He or she may also speak publicly on judicial policy regarding such matters.

But suppose that a judge were to argue publicly that nuclear power plants should be reopened in Belgium. That would be more problematic. It is important for a judge to exercise self-restraint in his or her judicial office.

AW: *What should be done to avoid conflicts and splits among the professional legal community?*

KL: I understand your question as referring to the way judges are appointed.

Major conflicts on this issue within the professional legal community in a Member State are of course undesirable. Such conflicts absolutely have to be resolved. There are Member States where that sort of conflict resolution in the legal field works well, thanks to a few very simple rules.

For instance, there is nothing wrong with Parliament making judicial appointments, as long as there is a requirement of a qualified majority, for example a 2/3 majority. That is, in itself, usually a guarantee of coalition building. On the contrary, requiring a bare majority for such appointments is a source of potential conflict. Take for example Germany. Candidates for the *Bundesverfassungsgericht,* the Federal Constitutional Court, are proposed by the political parties. However, a 2/3 majority in Parliament is needed to elect them as judges. Thus, the system is geared towards building consensus. Once judges are appointed, they have a single non-renewable term of office of 12 years and can act fully independently. The requirement of a 2/3 majority means that every judge's appointment is almost consensual. A judge proposed by one party also has to be accepted by other parties in the Parliament to achieve the 2/3 majority. Consensus building thus starts as soon as the proposal is made.

That reflects a political culture of what the German philosopher Jürgen Habermas calls 'deliberative' democracy. The parties may be in opposition to one another in the democratic debate, but they are not enemies; they work together towards the common good.

In the Kingdom of Belgium, the law requires that half the members of the constitutional court must be former politicians. However, in order to be appointed, a candidate needs to obtain a 2/3 parliamentary majority. Furthermore, a requirement for consent from both the Francophone and Flemish communities must also be met. Thus, all judges are elected with a 2/3 majority by Parliament and they also need to have a simple majority in both linguistic groups. This means that all francophone judges must be accepted by a simple majority in the Flemish group in the Parliament, and vice versa. It works perfectly well.

AW: *Politicians do not like consensus building, they like polarisation. In Poland, they spark polarisation by attacking judges and advocates general of the Court of Justice of the European Union. What is your role as the President of the CJEU in countering such attacks?*

KL: My role is to explain, very openly, what we do. And to remind the politicians that the European Union is *their* Union.

There are representatives of every Member State in all EU institutions and they are doing good work.

The Court of Justice of the EU, with its judges and advocates general, acts as a bridge between the EU institutions and bodies, on the one hand, and national authorities, on the other hand. It is entrusted with the task of ensuring that the domestic legal orders of the Member States and the common legal order of the EU operate harmoniously and in concert.

The EU is a common governance structure and an autonomous source of law. That legal space produces rules that are common to all Member States. 'Common' means: the same across the entire Union. *A fortiori* the principles and values upon which those rules are based are also common. The CJEU is the common judicial

body which explains those rules through interpretation in its judgments and ensures that all Member States are placed on an equal footing. It is a question of equality of all Member States and their legal systems before Union law.

The CJEU interprets existing rules. However, if politicians consider that certain EU rules are inadequate, they should act in an appropriate way at EU level. Politicians have many tools at their disposal. They can initiate new legislative acts or amendments to existing ones. A more extreme option is the possibility for the Member States, as “masters of the Treaties”, to modify the latter. That said, they can by no means alter the common, core values shared by all members of the club.

Imagine you are in the alumni club of your university and certain members are disregarding the core values of the club. In such a situation, you would not like to be associated with those other members. The same is true within the EU. When a State is a member of the EU, it needs to be seen as having the same core values as the other Member States. It is not a matter of a power grab or of singling out any particular Member States for criticism. It is simply a matter of making the system work.

AW: *Isn’t the CJEU, in a way, our protector against the current threats?*

KL: Yes, it is, but with an important caveat. The CJEU never takes a case on its own initiative. This is self-evident for lawyers. Some people however speak of the CJEU as though it were choosing to pick up on certain problems and then make judgments on them. This is totally wrong. The CJEU can only decide on cases when they are submitted to it by instances that are entitled to do so: the European Commission, a Member State or a national court, for example.

Even where the CJEU is seized by one of those instances, the Court’s competence is not without limits. For instance, certain references for a preliminary ruling are referred to the Court by a national court and yet are not admissible. That said, it is for the CJEU alone to decide that, and not for any national body. The CJEU thus has a monopoly on deciding whether a reference made by a national court is admissible or not since this is a matter of interpretation of EU law. That system has been in force since the 1950s, when the preliminary reference mechanism was created.

The CJEU plays its part loyally. Sometimes, it declares a preliminary reference inadmissible. That does not mean that there is no problem with the national legislation as such. It simply means that the conditions for delivering a preliminary ruling are not met in that particular case.

It is important for the CJEU to preserve its own legitimacy. The Treaties circumscribe its jurisdiction and the CJEU must therefore ascertain in every single case whether that case falls within the limits of that jurisdiction. The reasoning set out in the judgment must be transparent.

When a reference for a preliminary ruling is declared inadmissible, no one is to blame and certainly not the referring court. Lawyers know perfectly well that there are borderline cases, where one can make arguments in both directions. A lawyer

who loses a case is not a poor lawyer. The same is true of a judge whose reference for a preliminary ruling was found to be inadmissible. It is of utmost importance in all Member States that judges have the exclusive right to engage in judicial dialogue with the CJEU.

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